Supreme Court, U.S.
FILED
JAN 3 1984
ALEXANDER L. STEVAS
CLERK

JAN 6 PAGE 24

No. 83-5517

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HERBERT CHARLES BLATCHFORD, JR.,

Appellant,

vs.

HARVEY WINANS, Warden of the
New Mexico State Penitentiary,

Appellee.

On Appeal From The Supreme Court of The
State of New Mexico

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS

December, 1983

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QUESTION PRESENTED

Whether the Supreme Court of New Mexico correctly applied 18 U.S.C. §1151(a) and (b), to find that the New Mexico State District Court had jurisdiction to try appellant for crimes allegedly committed (a) within an extension to the Navajo Reservation added by Executive Order 709 (November 9, 1907), as amended by Executive Order 744 (January 28, 1908), and (b) in a dependent Indian community as defined by 18 U.S.C. §1151(b), and decisions of this Court?

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On Appeal from the Supreme Court of New Mexico

BRIEF OF APPELLANT IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

I. Introduction

In the Jurisdictional Statement, appellant anticipated the assertion of appellee that the decision appealed from rests upon adequate and independent state grounds.[1] However, the other point made in appellee's motion to dismiss or affirm, that the appeal is not within fragment (2) of Section 1257, Title 28, requires a response from appellant.

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[1]Appellee argues that the New Mexico Supreme Court decided this case on state procedural grounds, and that appellant's remedy, if any, is in state court under Rule 57, N.M. Crim. P. Motion of Appellee to Dismiss 3-4. However, appellee notes, as it must, that the New Mexico Supreme Court proceeded to address the merits of appellant's federal claim, and did, in the event, decide it. This determination of the federal issues would make appellant's invocation of the Rule 57 procedure futile, since the New Mexico Supreme Court has already passed on the question. The New Mexico Supreme Court ruled on the merits of Mr. Blatchford's claim; its decision on the substantive federal point was not obiter, and appellee does not claim that the opinion on the merits was an advisory opinion. Because of this, if Mr. Blatchford would follow appellee's suggestion and petition in federal district court for habeas corpus, he would not have to first present his federal claim to a state district court under Rule 57, N. M. Crim. P. because the New Mexico Supreme Court has already determined the merits of that claim. Fragment (d) of 28 U.S.C. §2254 does not require such wasted effort. See, e.g., Morishita v. Morris, 702 F. 2d 207, 209 (10th Cir. 1983), where the state supreme court had dismissed the petitioner's appeal for lack of jurisdiction, but did address the federal constitutional claim. The Court of Appeals held that there was no need for a further resort to state post-conviction procedures. Cf. Smith v. Dignon, 439 U.S. 332 (1978). Moreover, the availability of alternative

Under that rubric, jurisdiction of this Court is accorded to cases where the validity of a state statute is drawn into question on the grounds of it being repugnant to the Constitution, laws and treaties of the United States, and the decision of the state court upholds the state statute. Appellee contends that Mr. Blatchford's "concern" in the courts below "was not with the constitutionality of the state criminal laws but instead with whether Yah-ta-Hey, the location of the crime, is within Indian country." Motion of Appellee to Dismiss 4. This is an incorrect description of appellant's position throughout this case.

II. This Court Possesses Jurisdiction Under 28 U.S.C. §1257 (2)

Mr. Blatchford was convicted of two crimes by state court. In his state habeas petition papers, he contended that the state court lacked jurisdiction over the crimes he was alleged to have committed because of the exclusive provisions of 18 U.S.C. §1153. Appendix A to this brief contains the petition and its supporting memorandum. In it, the validity of the state criminal statutes under which Mr. Blatchford was convicted, N.M. Stat. Ann. §§ 40A-1-14, 40A-4-1 and 40A-9-21, was challenged as inapplicable in Yah-ta-Hey. The state district court agreed with this contention, holding that the state "had no jurisdiction to try petitioner, or to sentence him, for the offense charged" since "[t]he federal congress has reserved to itself exclusive jurisdiction to try crimes committed by Indians against Indians in such Indian country, and Dependant [sic] Indian Communities, and the State of New Mexico has not acted to extent its jurisdiction over such offenses committed in such areas." Blatchford v. Gonzales, Civ. No. 82-36-CV (N.M. 4th Jud. Dist. Ct., San Miguel Co. May 6, 1982), Appendix B to the Jurisdictional Statement, p. 11b. In the appeal before the New Mexico Supreme Court, the Supreme Court paraphrased Mr. Blatchford's contention as to the inapplicable statutes as a preface to its terse negative response regarding inapplicability of the state criminal statutes

(footnote 1 continued)
remedies is not a determinent of this Court's jurisdiction. See Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 477-79 (1975); cf. Belknap, Inc. v. Hale, 103 S. Ct. 3172, 3176 n. 5 (1983).

due to the non-binary character of 18 U.S.C. §1151 (a) and (b):

> Blatchford contends that the situs of the crime scene, Yah-ta-Hey, is "Indian country" as defined by 18 U.S.C. Section 1151 (1976), so as to require exclusive federal jurisdiction under 18 U.S.C. Section 1153 (1976). We do not agree.

Blatchford v. Gonzales, _____ N. M. _____, 670 P.2d 944, 946 (1983).

The New Mexico Supreme Court has held that these statutes were validly applied to Mr. Blatchford because 18 U.S.C. §1151 (a) and (b), which confer exclusive federal jurisdiction, was not applicable to, or valid within, Yah-ta-Hey. Blatchford v. Gonzales, supra. This Court has long entertained cases on appeal where a statutory challenge was made on the grounds that the statute "as so applied and enforced was repugnant to" federal law. Dahnke-Walker Co. v. Bondurant, 257 U.S. 282, 290 (1921); see also, e.g., Cohen v. California, 403 U.S. 15, 17-18 (1971); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 61 n.3 (1963).

Appellee also contends that the questions are insubstantial, and turn upon the peculiar constellation of facts which the state district court relied upon to find that Yah-ta-Hey was "Indian country" within the meaning of 18 U.S.C. §1151.[2] These facts were not disputed by appellee. They were not questioned by the New Mexico Supreme Court. They cannot be attacked here, at this late date, since this Court has recently rejected challenges to findings of fact unless these facts were clearly erroneous. See, e.g., Rogers v. Lodge, 102 S. Ct. 3272, 3278-79 (1982); Pullman-Standard v. Swint, 466 U.S. 283, 287-88 (1982).[3]

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[2]The area of the Executive Order 709 Reservation comprises approximately 1.9 million acres. Jurisdictional Statement 7. It can hardly be argued that the matter is picavune.

[3]These decisions are under Rule 52(a), F.R. Civ.P. New Mexico has an analogue copied from the federal rule, see Rule 52(a), N.M. R. Civ.P., and it follows the federal authorities in holding that a factual finding in a habeas or post conviction remedy case will not be set aside unless clearly erroneous or unsupported by substantial evidence. State v. Hardy, 78 N.M. 374, 377, 431 P.2d 752, 755 (1967). It is thus clear that the New Mexico Supreme Court addressed only legal issues in Blatchford, since it did not question the state district court's findings of fact as inadequate, inadmissible or inapposite.

Finally this Court has granted certiorari and heard oral argument this Term on a similar "Indian country" case. Solem v. Bartlett, No. 82-1253, O.T. 1983, oral argument heard December 7, 1983, 52 U.S.L.W. 3452; cert. granted, 103 S. Ct. 2427 (1983), to Bartlett v. Solem, 691 F. 2d 420 (8th Cir. 1982) (en banc). The question presented here is not of the parish-pump variety: it is of national significance.

III. Conclusion

Appellant therefore respectfully requests that this Court note probable jurisdiction.

Respectfully submitted,

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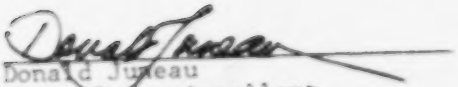
Dated: December, 1983

By: 
Donald Juneau
Counsel for Appellant.

MAR 3 0 REC'D
LEGAL AID

STATE OF NEW MEXICO COUNTY OF SAN MIGUEL

IN THE DISTRICT COURT

HERBERT CHARLES BLATCHFORD, JR.,

Petitioner,

vs.

MACARIO GONZALES, ADMINISTRATOR FORENSIC HOSPITAL,

Respondent.

ENDORSED FILED IN MY OFFICE THIS JAN 12 1982 CLERK DIST COURT

NO. 82-36-CV

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, for his cause of action, would Show:

1. Petitioner is restrained of his liberty by Respondent MACARIO GONZALES at the Forensic Hospital at Las Vegas, San Miguel County, New Mexico;

2. Petitioner is not detained or committed by virtue of any process, judgment, or execution of a competent court as set forth in N.M.S.A. § 44-1-2;

3. Petitioner believes the cause or pretense of his detention is a decision of the Supreme Court of the State of New Mexico, dated March 1, 1979, and a mandate based thereon, dated March 16, 1979, remanding Petitioner's cause to the McKinley County District Court, and thereby effecting Petitioner's sentence to life imprisonment. True copies of the decision and mandate are attached hereto and annexed hereto as Exhibits "A" and "B".

4. The restraint of Petitioner's liberty is unlawful. Petitioner was convicted of kidnapping and rape at Ya-Ta-Hey, McKinley County, New Mexico, and sentenced to life imprisonment. Execution of said sentence has been carried out at the Forensic Hospital at Las Vegas, New Mexico. For reasons fully set forth in the accompanying Memorandum of Law and Fact, the Judgment of the Trial Court was void for want of jurisdiction and Petitioner's continued dentention is unlawful.

WHEREFORE, Petitioner prays for a Writ of Habeas Corpus herein.

DATED this 25 day of January, 1981.

Forrest G. Buffington
Attorney for
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Telephone: 602/871-4941 Ext. 1370

In association with:

STATE OF NEW MEXICO COUNTY OF SAN MIGUEL

IN THE DISTRICT COURT

HERBERT CHARLES BLATCHFORD, JR.

Petitioner,

vs.

MACARIO GONZALES, ADMINISTRATOR FORENSIC HOSPITAL

Respondent.

ENDORSED
FILED IN MY OFFICE THIS
JAN 23 1970

NO. 82-36-CV

MEMORANDUM IN SUPPORT OF WRIT OF HABEAS CORPUS

Petitioner stands convicted of rape and kidnapping and by reason of said convictions is incarcerated at the Forensic Hospital at Las Vegas, New Mexico.

Petitioner now attacks said convictions on the basis that the trial court, the New Mexico.District Court of McKinley County, did not have jurisdiction of the subject matter of the prosecution.

18 USC 1153 provides that among other enumerated crimes, rape and kidnapping committed by an Indian within "Indian Country" are triable exclusively in the federal courts, and arennot within the jurisdiction of the state. Appendix, 18 USC 1153; Seymour v. Superintendent 368 US 351, 7 L Ed 2nd 346, 82 S Ct 424 Supreme Court, United States, (1962); Yohyowan v. Luce 291 F 425 District Court, E.D. Washington, S.D. (1923); Ex Parte Van Moore District Court, D. South Dakota, S.D. (1915). The exclusiveness of the jurisdiction of the federal courts cannot be seriously questioned.

Two essential questions therefore present themselves: 1.) is petitioner an Indian; and, 2.) is the locus of the crime "Indian Country" within the purposes of 18 USC 1153?

The question of the Indian status of Herbert C. Blatchford Jr. the petitioner, is easily resolved. Petitioner is enrolled as a Navajo Indian of the three-fourths blood with the Tribal Census Office (Exhibit 1). All other participants and victims of the crime are Navajo Indians of the whole blood. (Exhibits 2,3,4,).

The question of the "Indian Country" status of the situs of the crime is a factual matter guided by the definition of "Indian Country" contained in 18 USC 1151, which provides in part that a "dependent Indian community" shall be considered "Indian Country" for the jurisdictional purposes of 18 USC 1153. (Appendix)

Case law provides relevant factors to be considered in the determination of "dependent Indian community" status: Land title; purpose of the community; relationship of community to the tribe; relationship of community to federal government; practice of state agencies toward community; ethnic composition of the community. U.S. v. Mound U.S. District Court, D. South Dakota, C.D. (1979); U.S. v. Martine U.S. Court of Appeals, 10th Circuit (1971).

TITLE TO LAND

There is no dispute as to the location of the criminal acts of which petitioner stands convicted. The acts occurred at Yah-Ta-Hey community, an unincorporated settlement located approximately eight miles North of Gallup, New Mexico, and approximately two miles south of the Navajo Indian reservation proper. Land titile generally is of "checkerboard" type, consisting of federal trust, tribal, and allotment land interspersed with some fee and a small amount of state-owned land.

There was uncontradicted testimony that the criminal acts took place on fee land located at Yah-Ta-Hey junction, the intersection of highways 264 and 666, described and known locally as "J.B. Tanner's place." The fee land is bordered on all sides by Indian-title land. (Exhibit 5; Affidavit of Laurie Burnett) Land title is not a controlling factor. Seymour v. Superintendent, supra.

PURPOSE OF THE COMMUNITY

Yah-Ta-Hey is a trading and residential community. J.B. Tanner's, the most visible business at Yah-Ta-Hey, is a trading post, dealing in Navajo Rugs and pawn, Indian jewelry and similar items. A small store and a cafe, together with gas pumps, are the

sum total of J.B. Tanner's additional business. There is a gas station across the highway from J.B. Tanner's. There are a few small livestock purchasing businesses and a tiny scrap metal salvage yard in the vicinity. All business at Yah-Ta-Hey cater extensively and almost exclusively with the Navajo Trade.

Yah-Ta-Hoy has no planned purposes; however, the purpose of the businesses located there has been to trade with Navajo Indians.

RELATIONSHIP OF THE COMMUNITY TO THE TRIBE

Community residents who are members of the Tribe receive full benefits from the Tribe and are entitled to full participation in the affairs of the Tribe.

The Navajo Tribe extends its criminal jurisdiction over Yah-Ta-Hey, and has acted to extends its civil jurisdiction over the area.

Navajo Police Officers were on the scene with State Officers and FBI agents at the investigation of the crimes of which petitioner was convicted. Affidavit of Peter McDonald, Chairman, Navajo Tribe; Affidavit of Willis Peterson, Councilman, Navajo Tribe; Navajo Tribe v. Holyan 1 Nav. R. 78 (1973) Appendix; 7 N.T.C. §254, Appendix; Transcript.

RELATIONSHIP OF THE COMMUNITY TO THE FEDERAL GOVERNMENT

Yah-Ta-Hey community is within the Eastern Navajo Agency of the Bureau of Indian Affairs, Land Management District No. 16. Law Enforcement services are extended to the community by the FBI. Transcript The area receives BIA Social Services. Affidavit of Lucinda Sombrero.

PRACTICE OF STATE AGENCIES

Yah-Ta-Hey is in the infamous "checkerboard" area of New Mexico. State law enforcement services are provided implemented basically on the discreditedA"title" theory of jurisdiction, which is discredited. Seymour v. Superintendent, supra.

COMPOSITION OF THE COMMUNITY

Yah-Ta-Hey community is over sixty percent Native American according to the lastest Federal Census. Affidavit of Bruce Chapman; letter of Denver Office.

In conclusion, it must be found that Yah-Ta-Hey is a Dependent Indian Community. Substantial ties exist with the Federal Government and with the Tribe. The crime was perpetrates by Navajo Indians against Navajo Indians. The entire area is ethnically Native Americans. The name of the community Yah-Ta-Hey, is a corruption of the Navajo Indian word for "good" often used as a greeting as "hello" is used in English.

Yah-Ta-Hey is located two miles from the Navajo Reservation. It is within the boundaries of the Eastern Navajo Agency of the BIA. It has been dtormined by the courts of the Navajo Tribe and by its council to be "Indian Country" Yah-Ta-Hey is surrounded on all sides by Indian-title land. In short, it is "a Dependent Indian Community" under 18 USC 1151, and therefore, under 18 USC 1153, the federal courts have exclusive jurisdiction of the case.

The petitioner should be discharged; he is confined in contravention of the law.

Respectfully Submitted this_____day of _____, 1981.

FORREST G. BUFFINGTON
Navajo Legal Aid and Defender Service - Post Office Box 662
Window Rock, Arizona 86515

in association with

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS

CERTIFICATE OF INDIAN BLOOD

Part A (To be used if applicant is enrolled)

NAVAJO
Area

August 28, 1981
Date

I hereby certify that Herbert Blatchford Jr. is listed on the Navajo Tribal Roll, dated Jan. 1, 1940, recorded Aug. 29, 1957, an official record of this office, as being 3/4 degree Navajo Indian blood, and with Roll/ Census number, 103,583 and date of birth as June 10, 1953.

Frank E. Hardcastle
For Area Director
tvst/slb

Part B (To be used if applicant is not enrolled and relationship to an enrolled member of immediate family is established. i.e. parent, sister, brother.)

Area

Date

I hereby certify that _____ is listed on the _____ Roll, dated _____, recorded _____, an official record of this office, as being _____ degree Navajo Indian blood, and with Roll/ Census number _____, is known to me by records to be the _____ of _____.

Area Director

Note: The information contained herein has been taken from the official Tribal Roll of the Navajo Tribe.

5-417A

EXHIBIT 1